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# The line between free speech and hate speech

With the rise of incidents of bigotry on U.S. campuses after the November elections, a question has come up. How can we differentiate between free and hate speech and what can we do about the latter? The answer is complex, but there is a solution to the problem.

At the federal level – and contrary to popular belief – free speech is not absolute. The Supreme Court has ruled many times setting limits on speech, from child pornography cases, to deceptive advertisement to specific threats of violence. The fine line comes when dealing with espousing ideologies, like the ones held by hate groups such as the Ku Klux Klan.

The main hate crime statute is the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009. This statute makes it illegal to physically harm people based on their race, religion, national origin, gender or sexual orientation. Yet, the statute does not cover hate speech, nor does it criminalize threats of violence. Threats to inflict physical injury may be prosecutable under other hate crimes statutes, such as 42 U.S.C. § 3631 or 18 U.S.C. § 245. Such threats may also be prosecutable under generally applicable federal laws preventing interstate communication of threats. Some laws specifically address threats directed to some federal officials, such as the president.

However, the courts have ruled that comments intended as specific and immediate threats brush up against protections in the First Amendment, regardless of a person's race or religion. That is also the case of face-to-face comments meant to

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incite imminent lawlessness, such as violence or a riot. In 1942, a U.S. Supreme Court decision in the *Chaplinsky v. New Hampshire* case in which a Jehovah's Witness believer cursed at a city marshal, calling him a "damned fascist," articulated a "fighting words" doctrine that restricted insults intended to provoke an "immediate breach of the peace."

When specific threats are made, the courts have also determined that an actual threat (not just a vague and/or far-off remark) may constitute a crime. In the *Virginia v. Black* decision of 2003, the U.S. Supreme Court determined that a cross-burning in front of someone's property constitutes an act of verbal violence because such an act was an attempt to "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

Based on that decision, to generally say "Kill all the Jews," for example, is protected speech no matter how hateful it sounds, but to say "Kill that Jew who gave me an F" is considered a crime. Therefore, context is very important. In this case the hateful speech was directed to a particular individual.

In a recent case a white student entered a class the day after the election and, while looking at the only Latino in the room, said in loud voice so

everybody else could hear, "So, when are you going to be deported?" This is an example in which hate speech was specifically directed to an individual, and, therefore, is not protected speech.

A number of states go beyond federal law in criminalizing hateful speech. Many states have strict laws against hate crimes and discrimination and they fully and firmly enforce them. For instance, it is illegal in many states to target, harass, or discriminate against a person because of his or her race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation. The state of New York is an example.

Yet, the most important role can be that played by colleges and universities. The courts have ruled repeatedly that institutions of higher education can have stricter policies aimed at preventing certain speech or acts that create a hostile environment, allowing them to act based on their campus policies. We have already seen since the past elections that some campuses have even expelled students who have crossed those lines.

Many times those hate words do not have to be expressed verbally and/or in person, but may have been communicated through social media. For example, last week the names of six black freshmen students from the University of Pennsylvania were added to a racist group messaging thread. A University of Oklahoma student involved in the group was expelled from that institution and the Tulsa Community College's president said an unnamed student had been put on interim academic suspension while the college investigated his

possible involvement in the racist messages.

Sometimes words may not be necessary to be considered an act of hate speech. Paintings of nooses in areas frequented by African-American students, tying a rope around the neck of the statue of an African-American person, depiction of racial epithets in areas frequented by Latinos, throwing body parts of pigs at a Muslim center, painting swastikas in Jewish-related locations, or sending a powdery substance to a particular individual, are considered cause for expulsion on many campuses. More serious acts, such as pulling the hijab off of Muslim women – something that has happened repeatedly since the November elections – are considered hate crimes to be persecuted under the Shepard and Byrd Act.

At the end of the day it is up to academic institutions to have clear and well-founded rules on how to act in cases like the ones described above, prosecute those cases following proper procedures so due process is respected, and then act firmly in order to dissuade potential perpetrators from committing hate crimes.

Open discussions on issues of the day should continue and be encouraged since they are at the essence of higher education. But we need to always make sure that civility and respect are upheld.

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*The opinions expressed in this column are those solely of the author.*